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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 610

GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL.,

Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,

Appellees.

No. 611

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,

Appellants,

vs.

GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL.,

Appellees.

MEMORANDUM FOR APPELLANTS IN CASE No. 610 (APPELLEES IN CASE 611) CONCERNING SUBSTITUTION OF J. TOM WATSON AS A PARTY DEFENDANT.

J. TOM WATSON,
As Attorney General of the State of Florida.
TYRUS A. NORWOOD,
Assistant Attorney General.
LUCIEN H. BOGGS,
ANDREW W. BENNETT,
Counsel for Appellants in Case No. 610, and Appellees in Case No. 611.

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GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL.,

Appellees.

MEMORANDUM FOR APPELLANTS IN CASE No. 610 (APPELLEES IN CASE 611) CONCERNING SUBSTITUTION OF J. TOM WATSON AS A PARTY DEFENDANT.

This memorandum is filed as a result of questions and comment by members of the court when the case was argued orally April 29 and 30, 1941.

The matter is formally before the court upon a "Motion to Substitute Successor in Office" which is signed jointly by counsel for all parties to both appeals. This Motion was submitted to the court by counsel for the plaintiffs below. The Motion sets up the fact (Par. 3) that the term of office of George Couper Gibbs as Attorney General of Florida expired January 7, 1941, and that he was then succeeded by J. Tom Watson, who is now the duly qualified and acting Attorney General of the State of Florida. In paragraph 4 of the Motion, it is stated that:

> "Said J. Tom Watson has adopted and continues, and proposes to continue, the same course of conduct in the enforcement of the statutes of the State of Florida, involved in these appeals, that was adopted by his predecessor in office, said George Couper Gibbs, in enforcing said State Statutes."

Hence there arises the question as to just what was the "course of conduct in the enforcement of the statutes of the State of Florida, involved in these appeals" that was adopted by Watson's predecessor in office, George Couper Gibbs. The question has already been before this Court in connection with the first appearance of the case when it came up on the appeal of the State enforcement officers from the order granting the temporary injunction. The case was then identified as No. 276, October Term 1938, *Cary D. Landis, individually and as Attorney General of the State of Florida, et al., Appellants,* v. *Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, et al., Appellees.*

On August 15, 1938, the State's Attorneys, who were defendants in the court below, filed in this Court a motion to vacate the decree below and direct dismissal of the bill of

complaint. The motion contained the following allegations material to the consideration of the instant question:

"1. The death of the said Cary D. Landis May 10, 1938, occurred subsequent to the entry of order allowing appeal to this Court April 25, 1938; thereafter on May 31, 1938, the appellant State's Attorneys as defendants in the court below filed in the District Court suggestion of the death of said Landis and contemporaneously therewith filed their motion to dismiss suit for want of proper parties and on the ground that the question involved in the suit had become moot. A certified copy of said suggestion of death and motion are hereto attached, marked Exhibits 'A' and 'B' respectively, made part hereof.

"2. Thereafter on July 11, 1938, the appellees as plaintiffs in the court below filed in said District Court their motion for leave to file supplemental bill and with said motion tendered a proposed supplemental bill wherein they sought to implead as a party defendant George Couper Gibbs, the successor in office as Attorney General of the State of Florida. A certified copy of said motion is hereto attached, marked Exhibit 'C', made part hereof.

"3. Thereafter on July 11, 1938 the said George Couper Gibbs filed in said District Court his special appearance and objections to being made party defendant to said cause, certified copy of which with its supporting affidavit is hereto attached, marked Exhibit 'D', made part hereof; and on the same day the defendant State's Attorneys filed their objections to the plaintiffs' motion for leave to file supplemental bill, a certified copy of which is hereto attached, marked Exhibit 'E', made part hereof.

"4. Thereupon on the date last mentioned, July 11, 1938, said cause came on to be heard before the special statutory three judge court at Pensacola, Florida, upon the several motions, the special appearance and objections hereinabove referred to and was argued by coun-

sel whereupon said court on said date entered its order denying the motion of the defendant State's Attorneys to dismiss the cause, and denying the motion of the plantiffs for leave to file supplemental bill impleading George Couper Gibbs as party defendant in the place of said Cary D. Landis, deceased. A certified copy of said order is hereto attached, marked Exhibit 'F', made part hereof.

"5. That under Section 9 of the Florida statute attacked by the bill of complaint in this case, viz., Chapter 17807, Laws of Florida, 1937, it is specifically provided that all proceedings, civil or criminal, for the enforcement or violation of said statute are committed to the exclusive direction of the Attorney General of the State of Florida and that without such direction from him none of the State's Attorneys is empowered to take any action whatever. Therefore, the State's Attorneys are not necessary parties and the Attorney General is the only necessary party to this action. A copy of said statute is hereto attached, marked Exhibit 'G', made part hereof.

"6. The District Court correctly decided that the said George Couper Gibbs could not be impleaded as a party defendant in the face of his objections and supporting affidavit. (*Ex parte La Prade,* 289 U. S. 444.) In the absence of the official occupying the office of Attorney General of the State of Florida the controversy therefore became moot and the suit should be dismissed. (*Warner Stock Company* v. *Smith,* 165 U. S. 28; *Chandler* v. *Dix, et al.,* 194 U. S. 590; *Pullman Company* v. *Croom,* 213 U. S. 571; *Pullman Company* v. *Knott,* 243 U. S. 447; *Bernardin* v. *Butterworth,* 169 U. S. 600.)

Attached as exhibits to the motion were the following documents:

Exhibit "A"—Suggestion of the death of Cary D. Landis, Attorney General of Florida, filed in the District Court by the defendant State's Attorneys, who were co-defendants of Landis.

Exhibit "B"—Motion to dismiss suit filed in the District Court by the defendant State's Attorneys. The motion recited the death of Landis, the fact that the power of enforcing the statute was specifically lodged with the Attorney General and that the suit necessarily abated upon his death.

Exhibit "C"—Motion of plaintiffs below for leave to file supplemental brief substituting George Couper Gibbs, the now Attorney General, in place of Landis, deceased.

Exhibit "D"—Special appearance of George Couper Gibbs and objections to being made party defendant in the court below. This motion is verified by the affidavit of Gibbs, in which affidavit the following satement is made:

"I am without knowledge whether it is true as alleged in the original bill of complaint that the said Cary D. Landis was threatening or ever threatened to enforce the said State statute either against these complainants or others similarly situated, whether by enforcing the penal or confiscatory provisions of said statute or otherwise; although, based upon an investigation of the affairs of the office of my said predecessor, I am informed and believe that all such allegations are unfounded and untrue. However this may be, I assert most positively and without qualification that I have never threatened to enforce said State statute or any provision thereof at any time, either against the plaintiffs in said suit or any other persons whomsoever, either upon the contingencies referred to in said supplemental bill or otherwise; nor am I now making such threats or any of them; nor have I directed or authorized any of the parties defendant to said cause to take or to threaten to take any such action against any person, firm, association, or corporation whomsoever.

"No proceeding is now pending in any court looking to the enforcement of said statute under any direction or authority from me; and without such direction or authority no such proceeding may be brought."

Exhibit "E"—Objections filed by the defendant State's Attorneys to the plaintiffs' motion for leave to file supplemental bill.

Exhibit "F"—Order made by the specially constitued three-judge District Court denying the motion of the defendant State's Attorneys to dismiss the suit and denying the motion of the plaintiffs for leave to file the supplemental bill. The part of the order material to the instant situation reads as follows:

"It is the opinion of the Court that the State's Attorneys filing the motion to dismiss the cause are necessary parties defendant to the suit and, therefore, the cause did not abate as to them upon the death of said Honorable Cary D. Landis. Said motion to dismiss is denied.

"It is also the opinion of the Court that the supplemental bill, for which leave to file is asked, in effect substitutes Honorable George Couper Gibbs as a party defendant in the place of Honorable Cary D. Landis, deceased. On authority of *Ex parte La Prade,* 289 U. S. 444, said motion is denied."

On October 10, 1938, this Court entered an order denying the motion of the appellant State's Attorneys to vacate the decree and direct dismissal of the bill. At the same time, this Court directed the substitution of Gibbs, individually and as Attorney General, in the place of Landis, deceased.

After this Court had disposed of the interlocutory appeal, a supplemental bill was filed by the plaintiffs in the District Court May 31, 1939 (R. I, 94). This supplemental bill, after reciting the death of Landis and threats alleged to have been made by him as to enforcement of the 1937 Florida statute, alleged that Assistant Attorney General Norwood had been instructed by Gibbs to have the interlocutory injunction vacated; that Gibbs had adopted and continued the policy of his predecessor, Landis, with reference to enforcement of the statute, and that there was need to sub-

stitute Gibbs as a party defendant in place of Landis (R. I, 97, 98).

On June 19, 1939, the defendants, including Gibbs, filed their answer to the bill of complaint and supplemental bill (R. I, 100). This answer, while admitting the writing of a letter by Assistant Attorney General Norwood to Judge Foster (R. I, 96), the presiding judge of the special three judge court, denied specifically all other allegations of threats made either by Norwood or by Gibbs (R. I, 108).

This raised directly an issue of fact as to what was the conduct and policy of Gibbs with reference to enforcement of the act, and the burden of proof, of course, rested upon the plaintiffs. Nowhere in the entire record is there any evidence in support of the allegations of the supplemental bill as to threats on the part of Gibbs or conduct showing an intention to prosecute the plaintiffs either civilly or criminally.

The instant motion to substitute Watson for Gibbs does not admit either threats on the part of Watson or conduct beyond the admission that his course of conduct is the same as that of Gibbs. Nowhere in the record is there any proof that his conduct was such as to indicate an intention to prosecute.

Attention is directed to the fact that, under both of the Florida statutes, the Attorney General is in charge of all enforcement proceedings (see Section 9 of the 1937 Act, defendant's main brief, pp. 68, 69, and Section 12 of the 1939 Act, ibid., p. 81). The defendant State's Attorneys are, in essence, only formal parties to this suit, since they are powerless to act save under the direction of the Attorney General.

This subject was briefed in connection with the substitution of Gibbs in place of Landis, deceased, in case No.

276, October Term, 1938. We have asked the Clerk to supply the members of the Court with copies of this earlier brief in connection with the submission of this memorandum. The authorities are analyzed so fully in that brief that to reiterate them seems unnecessary.

Now that the case has been fully tried and presented on the merits, we do not deem it our duty to do more than to make available to the Court the exact situation of the record with regard to the attitude of the three Attorneys General who have held office during the pendency of the case.

Whatever may be the ruling on this matter, we earnestly hope that it will be found possible for this Court to indicate its views as to the constitutionality of the two Florida statutes and thus furnish a much needed guide to the legislative and executive branches of the State government.

Respectfully submitted,

(S.) J. TOM WATSON,
As Attorney General of the State of Florida,
TYRUS A. NORWOOD,
Assistant Attorney General,
LUCIEN H. BOGGS,
ANDREW W. BENNETT,
Attorneys for Appellants in Case #610, and Appellees in Case #611.

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SUPREME COURT OF THE UNITED STATES.

Nos. 610, 611.—October Term, 1940.

J. Tom Watson (Gibbs), individually and as Attorney General of the State of Florida, et al., Appellants,
610 *vs.*
Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, et al.

Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, et al., Appellants,
611 *vs.*
J. Tom Watson (Gibbs), individually and as Attorney General of the State of Florida, et al.

Appeals from the District Court of the United States for the Northern District of Florida.

[May 26, 1941.]

Mr. Justice Black delivered the opinion of the Court.

In broad outline, these cases involve the constitutionality of Florida statutes regulating the business of persons holding music copyrights and declaring price-fixing combinations of "authors, composers, publishers, [and] owners" of such copyrights to be illegal and in restraint of trade.

The American Society of Composers, Authors and Publishers (ASCAP), one of the appellants in No. 611 and one of the appellees in No. 610, is a combination which controls the performance rights of a major part of the available supply of copyrighted popular music. The other appellants in No. 611 (appellees in No. 610) are individual composers, authors and publishers of music controlled by ASCAP. The appellees in No. 611 (appellants in No. 610) are the Attorney General and all the state prosecuting attor-

neys of Florida who are charged with the duty of enforcing certain parts of the statutes in question.

These two cases were originally a single action, in which ASCAP and its co-parties sought to enjoin the state officials from enforcing a 1937 Florida statute.[1] A federal district court, composed of three judges under § 266 of the Judicial Code, granted a temporary injunction, and this Court affirmed without passing upon the merits of the constitutional questions involved. *Gibbs* v. *Buck*, 307 U. S. 66. A supplemental bill of complaint was then filed, asking that the three judge court enjoin a 1939 Florida statute relating to the same subject.[2] On final hearing, the three judge court again enjoined the state officials from enforcing any part of the 1937 statute, but granted the injunction only as to certain sections of the 1939 act. 34 F. Supp. 510. No. 611 is an appeal by ASCAP and its co-complainants from the refusal to enjoin the state officials from enforcing the remainder of the 1939 act. No. 610 is an appeal by the state officials from the order granting the injunction as to the 1937 act and as to certain sections of the 1939 act.

The court below, without passing at all upon the validity of thirteen out of the twenty-one sections and subsections of the 1937 act, held that the remaining eight sections deprived copyright owners of rights granted them by the federal copyright laws, and that the statute must fall in its entirety. This it did upon the premise that the sections held invalid and the other parts of the bill were intended by the Florida legislature to form "a harmonious whole" and to "'stand or fall together.'" The ultimate questions involved are such that we must first determine whether this ruling was correct. We hold that it was not, for the following reasons.

The Florida legislature expressed a purpose directly contrary to the District Court's finding. For what the legislature intended in this regard was spelled out in section 12 of the Act in the clear and emphatic language of the legislature itself. That section reads:

"If any section, sub-section, sentence, clause or any part of this Act, is for any reason, held or declared to be unconstitutional, imperative [sic] or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconsti-

[1] Fla. Laws 1937, ch. 17807.

[2] Fla. Laws 1939, ch. 19653.

tutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part of parts, shall be held and deemed to be valid as if such excluded parts had not been included herein."

This is a flat statement that the Florida legislature intended that the act should stand and be enforced "after the exclusion of such part or parts" as might be held invalid. Unless a controlling decision by Florida's courts compels a different course, the federal courts are not justified in speculating that the state legislature meant exactly the opposite of what it declared "to have been the legislative intent." But the Supreme Court of Florida recognizes and seeks to carry out the legislative intent thus expressed. Speaking of a similar severability clause of another statute, that court said: "The Act as a whole evinces a purpose on the part of the Legislature to impose a license tax on chain stores and Section fifteen provides that if any section, provision or clause thereof, or if the Act as applied to any circumstance shall be declared invalid or unconstitutional such invalidity shall not affect other portions of the Act held valid nor shall it extend to other circumstances not held to be invalid. Under the liberal terms of Section fifteen it may be reasonably discerned that the Legislature intended that the Act under review should be held good under any eventuality that did not produce an unreasonable, unconstitutional or an absurd result. . . . The test to determine workability after severance and whether the remainder of the Act should be upheld rests on the fact of whether or not the invalid portion is of such import that the valid part would be incomplete or would cause results not contemplated by the Legislature." *Louis K. Liggett Co.* v. *Lee*, 109 Fla. 477, 481. Measured by this test the court below was in error, for there can be no doubt that section 1 and the other sections upon which the court failed to pass are complete in themselves; they are not only consistent with the statute's purpose but are in reality the very heart of the act, comprising a distinct legislative plan for the suppression of combinations declared to be unlawful. For as pointed out by the court below, the sections that were not passed on are those which outlaw combinations to fix fees and prescribe the means whereby the legislative proscription against them can

be made effective.[3] Since, therefore, that phase of the act which aimed at unlawful combinations is complete in itself and capable of standing alone, we must consider it as a separable phase of the statute in determining whether the injunction was properly issued against the state officials.

As a matter of fact, as the record stands the right of ASCAP and its co-complainants to an injunction depends upon this phase of the statute and is not to be determined at all by the validity or invalidity of the particular sections which the court below thought inconsistent with the federal Constitution and the copyright laws passed pursuant to it. The ultimate determinative question, therefore, is whether Florida has the power it exercised to outlaw activities within the state of price fixing combinations composed of copyright owners. But before considering that question it is necessary that we explain why we do not discuss, and why an injunction could not rest upon, any other phase of Florida's statutory plan.

Defendants in the injunction proceedings are the state's Attorney General, who is charged with the responsibility of enforcing the state's criminal laws, and all of the state's prosecuting attorneys, who are subject to the Attorney General's authority in the performance of their official duties.[4] Under the statutes before us, it is made the duty of the state's prosecuting attorneys, acting under the Attorney General's direction, to in-

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[3] The Court said:

"There remain. Sections 1, 2-C and 3, in effect declaring ASCAP and similar societies illegal associations, outlawing its arrangements for license fees, and proscribing and making an offense, attempts to collect them; Section 7-B making persons, acting for such a combination, agents for it and liable to the penalties of the Act; Section 8 fixing the penalties; Section 9 giving the state courts jurisdiction to enforce the Act, civilly and criminally; and Sections 10-A, 10-B, 11-A and 11-B, prescribing procedure under it." 34 F. Supp. 516. With the possible exception of section 3, nowhere in the course of the opinion were any of these sections held invalid.

[4] The Secretary of State and the State Comptroller were added as parties defendant by a "Further Supplemental Bill of Complaint" filed October 19, 1939. The ground given by the complainants for adding parties was that certain duties were imposed on these officials by the 1939 act. The duties, however, required only that certain fees be collected, and not that actions be brought to enforce the law.

In the course of this litigation, Florida has had three Attorneys General. The present Attorney General took office on January 7, 1941, and all the parties have joined in a motion to substitute him as a defendant in place of his predecessor in office. There is no objection to the substitution, and the motion is granted.

stitute in the state courts criminal or civil proceedings. The original bill alleged that the defendants had threatened to—and would, unless restrained—enforce the 1937 statute "in each and all of its terms and the whole thereof, and particularly against these complainants and others similarly situated . . . ", and that as a consequence complainants would suffer irreparable injury and damages. The supplemental bill contained similar allegations as to the 1939 act. Both bills were drawn upon the premise that complainants were entitled to an injunction restraining all the state's prosecuting officers from enforcing any single part of either of the lengthy statutes, under any circumstances that could arise and in respect to each and every one of the multitudinous regulations and prohibitions contained in those laws. In their answers, the state's representatives specifically denied that they had made any threats whatever to enforce the acts against complainants or any one else. In their answer to the supplemental bill, however, they said that they would perform all duties imposed upon them by the 1939 act. The findings of the court on this subject were general, and were to the effect that "Defendants have threatened to and will enforce such State Statutes against these Complainants and others similarly situated in the event that such Complainants and others similarly situated refuse to comply with said State Statutes or do any of the acts made unlawful by said State Statutes." It is to be noted that the court did not find any threat to enforce any specific provision of either law. And there is a complete lack of record evidence or information of any other sort to show any threat to prosecute the complainants or any one else in connection with any specific clause or paragraph of the numerous prohibitions of the acts, subject to a possible exception to be discussed later. The most that can possibly be gathered from the meager record references to this vital allegation of complainants' bill is that though no suits had been threatened, and no criminal or civil proceedings instituted, and no particular proceedings contemplated, the state officials stood ready to perform their duties under their oath of office should they acquire knowledge of violations. And as to the 1937 act, the state's Attorney General took the position from the very beginning, both below and in this Court, that under his construction of the earlier act no duties of any kind were imposed upon him and his subordinates except with relationship to prohibited combinations of the type defined in section 1.

Federal injunctions against state criminal statutes, either in their entirety or with respect to their separate and distinct prohibitions, are not to be granted as a matter of course, even if such statutes are unconstitutional. "No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seek its aid." *Beal* v. *Missouri Pacific Railroad Corp.*, 312 U. S. 45, 49. A general statement that an officer stands ready to perform his duty falls far short of such a threat as would warrant the intervention of equity. And this is especially true where there is a complete absence of any showing of a definite and expressed intent to enforce particular clauses of a broad, comprehensive and multi-provisioned statute. For such a general statement is not the equivalent of a threat that prosecutions are to be begun so immediately, in such numbers, and in such manner as to indicate the virtual certainty of that extraordinary injury which alone justifies equitable suspension of proceedings in criminal courts. The imminence and immediacy of proposed enforcement, the nature of the threats actually made, and the exceptional and irreparable injury which complainants would sustain if those threats were carried out are among the vital allegations which must be shown to exist before restraint of criminal proceedings is justified. Yet from the lack of consideration accorded to this aspect of the complaint, both by complainants in presenting their case and by the court below in reaching a decision, it is clearly apparent that there was a failure to give proper weight to what is in our eyes an essential prerequisite to the exercise of this equitable power. The clear import of this record is that the court below thought that if a federal court finds a many-sided state criminal statute unconstitutional, a mere statement by a prosecuting officer that he intends to perform his duty is sufficient justification to warrant the federal court in enjoining all state prosecuting officers from in any way enforcing the statute in question. Such, however, is not the rule. "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. . . . To justify such in-

terference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. . . . We have said that it must appear that 'the danger of irreparable loss is both great and immediate'; otherwise the accused should first set up his defense in the state court, even though the validity of a statute is challenged. There is ample opportunity for ultimate review by this Court of federal questions." *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, 95-96.

Such "exceptional circumstances" and "great and immediate" danger of irreparable loss were not here shown. Tested by this rule, therefore, and with the possible exception of that phase of the statute outlawing Florida activities by combinations declared unlawful in section 1 of the 1937 act (which we shall later consider separately), neither the findings of the court below nor the record on which they were based justified an injunction against the state prosecuting officers.

In addition to the fact that the situation here does not meet the tests laid down in the decided cases, the very scope of these two statutes illustrates the wisdom of a policy of judicial self restraint on the part of federal courts in suspending state statutes in their entirety upon the ground that a complainant might eventually be prosecuted for violating some part of them. The Florida Supreme Court, which under our dual system of government has the last word on the construction and meaning of statutes of that state, has never yet passed upon the statutes now before us. It is highly desirable that it should have an apportunity to do so.[5] There are forty-two separate sections in the two acts. While some sections are repetitious, and while other sections are unimportant for present purposes, there are embraced within these two acts many separate and distinct regulations, commands and prohibitions. No one can foresee the varying applications of these separate provisions which conceivably might be made. A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another.

[5] Cf., e. g., Arkansas Corporation Commission v. Thompson, 312 U. S. —, —; Railroad Commission of Texas v. Pullman Co., 312 U. S. —, —; Railroad Commission of Texas v. Rowan & Nichols Oil Co., 311 U. S. 570, 575; Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 483; Ex parte Baldwin, 291 U. S. 610, 619; Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159, 207.

Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case. It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it. It is sufficient to say that the statutes before us are not of this type. Cases under the separate sections and paragraphs of the acts can be tried as they arise—preferably in the state courts. Any federal questions that are properly presented can then be brought here. But at this time the record does not justify our passing upon any part of the statute except, possibly, that phase which prohibits activities in Florida by combinations declared unlawful. While the proof and findings in this regard are not as clear and specific as they might and should be, we nevertheless, under the circumstances of this case, proceed to this ultimate and decisive question.

In the consideration of this case, much confusion has been brought about by discussing the statutes as though the power of a state to prohibit or regulate combinations in restraint of trade was identical with and went no further than the power exercised by Congress in the Sherman Act. Such an argument rests upon a mistaken premise.[6] Nor is it within our province in determining whether or not this phase of the state statute comes into collision with the federal Constitution or laws passed pursuant thereto to scrutinize the act in order to determine whether we believe it to be fair or unfair, conducive to good or evil for the people of Florida,

[6] We have been referred to a recent consent decree against ASCAP in the federal district court for the Southern District of New York, the theory being that the decree might have some bearing upon the state's power to pass the legislation now under attack. But it has not. In matters relating to purely intrastate transactions, the state might pass valid regulations to prohibit restraint of trade even if the federal government had no law whatever with reference to similar matters involving interstate transactions.

or capable of protecting or defeating the public interest of the state.[7] These questions were for the legislature of Florida and it has decided them. And, unless constitutionally valid federal legislation has granted to individual copyright owners the right to combine, the state's power validly to prohibit the proscribed combinations cannot be held non-existent merely because such individuals can preserve their property rights better in combination than they can as individuals. We find nothing in the copyright laws which purports to grant to copyright owners the privilege of combining in violation of otherwise valid state or federal laws. We have, in fact, determined to the contrary with relation to other copyright privileges.[8] But complainants urge that there is a distinction between our previous holdings and the question here. This contention is based on the idea that Congress has granted the copyright privilege with relation to public performances of music, and that with reference to the protection of this particular privilege, combination is essential. We are therefore asked to conclude from the asserted necessities of their situation that Congress intended to grant this extraordinary privilege of combination. This we cannot do. We are pointed to nothing either in the language of the copyright laws or in the history of their enactment to indicate any congressional purpose to deprive the states, either in whole or in part, of their long-recognized power to regulate combinations in restraint of trade. Compare *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U. S. 86, 107.

Under the findings of fact of the court below, ASCAP comes squarely within the definition of the combinations prohibited by section 1 of the 1937 act. Section 1 defines as an unlawful combination an aggregation of authors, composers, publishers, and owners of copyrighted vocal or instrumental musical compositions who form any society, association, or the like and the members of which constitute a substantial number of the persons, firms or corporations within the United States who own or control such musical compositions and "when one of the objects of such combination is

[7] The court below concluded as a matter of law that "enactment of the said Statute was not necessary to protect, nor does it serve the public interest of the State of Florida. . . ."

[8] Interstate Circuit, Inc. v. United States, 306 U. S. 208. Cf. Fashion Originators' Guild of America v. Federal Trade Commission, 312 U. S. —; Ethyl Gasoline Corp. v. United States, 309 U. S. 436.

the determination and fixation of license fees or other exactions required by such combinations for itself or its members or other interested parties." Section 8 of the 1937 act makes it an offense for such combinations "to act within this State in violation of the terms of this Act." The court below found that there were 1425 composers and authors who were members of ASCAP; that the principal music publishers of the country are members; that the Society controls the right of performance of 45,000 members of similar societies in foreign countries; and that the Board of Directors of ASCAP have "absolute control over the fixing of prices to be charged for performance licenses . . . ." Since under the record and findings here ASCAP is an association within the meaning of section 1 of the 1937 act, we are not called upon at its instance to pass upon the validity of other provisions contained in the numerous clauses, sentences, and phases of the 1937 or 1939 act which might cover other combinations not now before us. It is enough for us to say in this case that the phase of Florida's law prohibiting activities of those unlawful combinations described in section 1 of the 1937 act does not contravene the copyright laws of the federal Constitution; that particular attacks upon other specified provisions of the statutes involved are not appropriate for determination in this proceeding; that the court below erred in granting the injunction; and that the bill should have been dismissed. All other questions remain open for consideration and disposition in appropriate proceedings. For the reasons given, the judgment below in No. 610 is reversed and the cause is remanded to the lower court with instructions to dismiss the bill. The judgment in No. 611 is affirmed.

It is so ordered.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.